STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
The Hon. Donald S. Owens, Stephen L. Borrello, and Cynthia Diane Stephens

POWER PLAY INTERNATIONAL, INC., and GORDON HOWE,

Plaintiffs-Appellees,

v

DEL REDDY, AARON HOWARD, MICHAEL REDDY and IMMORTAL INVESTMENTS, L.L.C.,

Defendants-Appellants,

and

AARON HOWARD, MICHAEL REDDY and IMMORTAL INVESTMENTS, L.L.C.,

Defendants/Counter-Plaintiffs-Appellants,

v

POWER PLAY INTERNATIONAL, INC., and GORDON HOWE,

Plaintiffs/Counter-Defendants-Appellees.

Supreme Court No. 154347

Court of Appeals No. 325805

Lower Court No. 11-123508-CK

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DEFENDANTS-APPELLANTS' REPLY TO PLAINTIFFS-APPELLEES' RESPONSE TO APPLICATION FOR LEAVE TO APPEAL

Dated: October 11, 2016

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In response to Argument I of Defendants-Appellants Del Reddy, Aaron Howard, Michael Reddy, and Immortal Investments, L.L.C.'s ("Defendants") Application, Plaintiffs-Appellees Power Play International, Inc. and Gordon Howe ("Plaintiffs") argue that Howard Baldwin was really just a lay witness and therefore, no inquiry into his qualifications or methodologies was necessary. However, even as it sought to re-frame Mr. Baldwin as a lay-witness, the Court of Appeals acknowledged that "Baldwin's testimony certainly involves some type of specialized knowledge" (Ex. 1 attached to Application, p 10), that the trial court referred to as him "plaintiffs' expert" just before Plaintiffs presented him (Id., p 9 n 3), that Defendants "attacked his qualifications in their opening statement" (Id.), that Plaintiffs "asserted at [appellate] oral argument that they did move to qualify Baldwin as an expert and were asked by the trial court to lay a foundation" (Id.), and that "the trial court and the parties all seemed to act as if he were qualified as an expert" (Id.). The record clearly demonstrates that Mr. Baldwin's testimony went far beyond matters of which he had personal knowledge and - regardless of whether he was technically qualified as such – he was clearly presented to, and perceived by, the jury as an expert.

This error is jurisprudentially significant because the trial court failed to exercise its gatekeeper function, and the Court of Appeals avoided (through its characterization of Mr. Baldwin as a lay witness) any meaningful review of that failure. Howard Baldwin had no relevant expertise in valuation, and Plaintiffs make no real attempt to dispute this in their Answer to the Application. Mr. Baldwin's lack of relevant expertise was established by the following exchange from his *de benne esse* deposition (Ex. 6 attached to Application, pp 6-7):

> Q. …Earlier you testified about two instances where you've provided expert testimony; do you recall that?
>
> A. Do I recall testifying to that? … Yes, I do.

> Q. In those two instances … [the testimony] pertained to the valuation of a hockey franchise; is that correct?
>
> A. No. One was a hockey franchise. The other was a basketball franchise.
>
> Q. …[B]oth instances dealt with the valuation of a professional sports franchise; is that correct?
>
> A. …That's correct.
>
> Q. …And you do understand that in this case there is no issue concerning the sale of any franchise in professional sports, correct?
>
> A. Of course I understand that.
>
> Q. …[S]o it's safe to say that you have never provided any expert testimony concerning the value of hockey memorabilia or personal property?
>
> A. …[T]hat is safe to say, correct.

Rather than relying upon "technical" or "other specialized knowledge" to "assist the trier of fact," MRE 702, Mr. Baldwin performed a Google search (Id., pp 7-8):

> Q. …[T]ell me … the calculation you used to come to … those figures.
>
> A. …Let me give you what it includes, okay? And everybody can Google it and see it [on] the internet because it's a very recent case of Kobe Bryant vs. his mother…. … Kobe Bryant is an icon. Gordie Howe is an icon, as is Mark and Marty and the value that … they're arguing over is somewhere between $496,000 and well over a million dollars.

Even if Mr. Baldwin had the requisite qualifications, his opinions should have been excluded because they were not based upon facts in evidence. Mr. Baldwin admitted under oath at *his de benne esse* deposition that he has absolutely no knowledge at all as to what materials may have been destroyed, and therefore could not state that the destroyed materials had any value.

(Ex. 6 attached to Application, pp 9-12.) Mr. Baldwin was never told that anyone with personal knowledge actually knew that anything from the Howe's memorabilia collection was missing. (Id., p 10.) He was not aware of any particular item of hockey memorabilia that the Plaintiffs were seeking recovery for. (Id.) Mr. Baldwin tried to bolster his opinions with testimony about a film clip of Gordie Howe that he had recently purchased from the National Hockey League, for use in a movie he was producing, for $75,000.00. (Id., p 11.) However, as Defendants argued in their motion in limine, this was irrelevant because the clip was from Gordie Howe's playing days, not from the time period that he was doing autograph sessions through Power Play International (starting approximately 15-20 years after his retirement). (Id.) There was no evidence that film or video from Gordie Howe's playing days were destroyed by the Defendants. (Id., pp 11-12.)

Moreover, Mr. Baldwin's personal knowledge about this irrelevant $75,000.00 purchase was itself dubious. At his *de benne esse* deposition, he testified:

> Q. Did you sign a contract to purchase the clips from the NHL that were used in your film of "Mr. Hockey"?
>
> A. No. The production does all that.
>
> Q. …[Y]ou weren't involved in the actual signing of any agreements where Number Nine Productions purchased the film footage from the NHL, correct?
>
> A. Correct. (Ex. 6 attached to Application, p 12.)

Mr. Baldwin's testimony on this point therefore lacked the requisite foundation pursuant to MRE 702, and should have been excluded. (See Id.) Indeed, all of his valuation figures were based upon speculation and conjecture, something Mr. Baldwin admitted in deposition testimony Defendants provided to the lower court as part of their second motion in limine. (Id., pp 12-14.)

"The distinction, although admittedly subtle, between lay and expert witness testimony is that lay testimony results from a process of reasoning that is familiar in everyday life, while expert

testimony results from a process of reasoning which can be mastered only by specialists in the field." *U.S. v Gyamfi,* 805 F3d 668, 674 (6th Cir 2015). Negotiating movie deals is not a "process of reasoning familiar in everyday life" and as the Court of Appeals acknowledged, Mr. Baldwin's testimony required specialized knowledge in a narrowly defined field. (Ex. 1 attached to Application, p 10.) The panel also acknowledged that not all of Mr. Baldwin's testimony was based on personal knowledge. (Id., p 9 n 4.) The characterization of Mr. Baldwin as a lay witness – rather than an expert, as Plaintiffs repeatedly referred to him in the Court of Appeals (Ex. 12 attached to Application, pp 4, 16, 30-32, 34) – led to the panel giving only a cursory nod to MRE 702 and a statement that any error was "harmless." (Ex. 1 attached to Application, p 10 n 4.)

Had the Court of Appeals correctly viewed Mr. Baldwin as a proffered expert, it would have found his expert qualifications lacking and in turn, that the lower court erred in allowing him to testify. Moreover, had the Court correctly viewed Mr. Baldwin as a proffered expert, it *could not* have invoked the harmless error doctrine, given the weakness of Plaintiffs' other damages proofs. "Unless the appellate court believes it highly probable that the error did not affect the judgment, it should reverse. Any test less stringent entails too great a risk of affirming a judgment that was influenced by an error. Moreover, a less stringent test may fail to deter an appellate judge from focusing his inquiry on the correctness of the result and then holding an error harmless whenever he equated the result with his own predilections." *People v Mateo,* 453 Mich 203, 219-220; 551 NW2d 891 (1996) (citation omitted). This standard has been cited favorably in the civil context, *Johnson v Corbet,* 423 Mich 304, 336; 377 NW2d 713 (1985) (Levin, J., concurring) and is not adequately addressed by the Plaintiffs in their Answer to the Application.

Plaintiffs oppose Defendants' Argument II solely on the grounds of waiver, i.e. that Defendants' failure to make an offer or proof purportedly forecloses appellate review of the trial

court's *sua sponte* limitation of Mr. Baldwin's cross-examination. However, because "the substance of the evidence … was apparent from the context within which questions were asked," an offer of proof as to Mr. Baldwin's deposition transcript was not necessary. MRE 103(a)(2). See *People v Snyder*, 462 Mich 38, 43-44; 609 NW2d 831 (2000), holding that the exclusion of evidence was "adequately presented and preserved" at trial where "counsel was attempting to explain the nature and content of the proposed impeachment when he was cut off by the circuit court." Moreover, the particular testimony that Defendants' counsel sought to use for impeachment was "apparent from the context" because it was already in the record, as it had been attached as an exhibit to Defendants' May 28, 2013 Emergency Motion in Limine. (See Ex. 6 attached to Application; see also 1/14/15 trans, p 15.) Much of the testimony that Defendants sought to use at trial had also been attached to their February 27, 2013 "Motion for Summary Disposition on Want of Damages." (Ex. 11 attached to Application.)

The most fundamental cross-examination tool is impeachment. See *Int'l Union, UAW v Dorsey*, 273 Mich App 26; 730 NW2d 17 (2006), where the panel stated that MRE 607 "allows the credibility of ***any*** witness to be attacked by ***any*** party." *Id.* at 29 (emphasis added). The panel further reiterated the fact that MRE 613 "acknowledges that a witness may be asked about prior inconsistent statements." *Id.* at 29-30. As *Dorsey* and *Ruhala v Roby*, 379 Mich 102; 150 NW2d 146 (1967) reflect, it is axiomatic that a deposition may be used at trial to impeach a witness. MCR 2.302(C)(7). Defendants' ability to impeach Mr. Baldwin was particularly critical here in light of the dubious factual foundation for Mr. Baldwin's valuation opinions, as set forth in the Application. As noted above, when Defendants cross-examined Mr. Baldwin at his *de benne esse* deposition on May 20, 2013, he acknowledged that the centerpiece of his testimony – that the value of the materials allegedly destroyed in this case *could* be between $500,000.00 and $1,000,000.00

– was predicated on a Google search. (Ex. 6 attached to Application, pp 7-8.) Mr. Baldwin readily admitted that his valuation opinions were entirely hypothetical: "There are no facts without actually knowing … what we're talking about here. … *So everything is hypothetical. Everything is hypothetical.* (Id., p 13, emphasis added.)

At trial, Mr. Baldwin opined that the materials allegedly destroyed by Defendants could have been worth *a total of* $500,000 to $1,000,000. (6/14/13 trans, p 52.) He further testified that his opinion was based on factual evidence that Gordie Howe was specifically associated with the allegedly destroyed materials. (Id., pp 71, 82-83.) This put Mr. Baldwin's trial testimony directly at odds with his previous deposition testimony, wherein he testified he had no foundation basis to support any opinions regarding the value of any items allegedly destroyed in this case. (See Ex. 6 attached to Application, pp 9-10, 13.) When Defendants' counsel attempted to impeach Mr. Baldwin at trial (for the first time, of many times that were planned), with his prior deposition testimony, the lower court asked Defendants' counsel and Plaintiffs' counsel to approach, and made a ruling at a side bar that Mr. Baldwin's prior testimony could not be used at all at trial, even to impeach the witness. (6/14/13 trans, p 101.) Defendants' counsel twice referred Mr. Baldwin to his deposition transcript before the Court stopped the questioning (Id., p 100), leaving no doubt about what Defendants' counsel planned to use for impeachment.

The lower courts' handling of this issue was contrary to well established law that evidence otherwise "inadmissible as substantive evidence" may still be "admissible for impeachment purposes." *In re Forfeiture of $180,975*, 478 Mich 444, 477; 734 NW2d 489 (2007) (Markman, J., dissenting). Undoubtedly, prior inconsistent statements are admissible to impeach the testimony of a witness. *Schratt v Fila*, 371 Mich 238, 244; 123 NW2d 780 (1963). Conversely, *disallowing* impeachment under such circumstances has repeatedly been held to constitute

reversible error. See, for example, *Poore v State,* 501 NE 2d 1058, 1061 (Ind 1986) and *Daeda v State,* 841 So 2d 632 (Fla App 2003). These decisions reflect that the ability of a party to cross-examine a witness with a prior inconsistent statement is a fundamental trial tool. Trials are won or lost on the testimony of trial witnesses, especially expert witnesses. Therefore, having the ability to undermine the credibility of a trial witness, in particular expert witnesses, is the best way to demonstrate what weight should be given to a witness's testimony, if *any*.

The prejudice to the defense cannot be overstated; Mr. Baldwin was either Plaintiffs' sole expert, or one of only a handful of damages witness, and he previously gave contradictory testimony under oath regarding the only issue that he was put before the jury to discuss (valuation of the supposedly lost property). The lower court – without any prompting from the Plaintiffs' counsel – interjected itself into the examination and prevented the jury from hearing it. The prejudicial effect of this is reflected in the size of the jury verdict. This Court now has an opportunity to send a message to trial courts throughout the state that cross-examination, specifically impeachment, is a bedrock of trial practice and should not be impeded absent extraordinary circumstances that were not present here.

The Court of Appeals' mischaracterization of Mr. Baldwin as a lay witness also tainted its analysis of this argument. The Court of Appeals simply held that the issue was unpreserved and that any error would have been harmless. (Ex. 1 attached to Application, p 11 n 5.) For reasons explained above and in more detail in the Application, Defendants did preserve this issue and the absence of a formal "offer of proof" should not have foreclosed a more substantive review by the Court of Appeals. It was undisputed that during trial, Defendants sought to cross-examine Mr. Baldwin – who was either Plaintiffs' only proffered damages expert, or one of only a handful of proffered lay damages witnesses, in a trial that was only about damages – with a deposition

transcript. (6/14/13 trans, pp 100-101.) Defense counsel's sworn account of the sidebar exchange (Ex. 8 attached to Application) confirmed that he "intended to impeach … [Mr.] Baldwin, with his prior inconsistent statements given at two prior depositions in this case." The lower court ruled that Defendants' counsel "was not to ask any cross-examination questions of the witness based on the depositions," because the *de benne esse* deposition of Mr. Baldwin had previously been stricken. (Id.) Defendants' counsel sought to clarify this, but the trial court "made it clear that [Defendants' counsel] was to ask no cross-examination questions of Mr. Baldwin based on prior inconsistent statements under oath." (Id.) Therefore, nothing in the record "implies that defense counsel was satisfied with the ruling made during the bench conference." (Ex. 1 attached to Application, p 11.) To the contrary, at the post-judgment motion hearing (1/14/15 trans, p 4), Defendants' counsel complained that there were *two* deposition transcripts that he had been prevented from using for cross-examination. The trial court made no attempt to clarify its prior ruling. (Id., p 6.) At this hearing, Defendants' lead trial counsel protested *for a second time* (the first being in the Affidavit filed with the post-judgment motion) that he was denied use of *both of* Baldwin's depositions, and the trial judge made no effort to "correct" him.

Therefore, the record makes it abundantly clear that Defendants were precluded from cross-examining Mr. Baldwin with any of Mr. Baldwin's prior testimony; both the discovery deposition and the *de bene esse* deposition transcripts were precluded. Plaintiffs never articulated any legal basis for this result. Their sole argument in response to this argument was, and remains, lack of preservation. (See Ex. 12 attached to Application, pp 34-36.) Critically, neither the Plaintiffs, nor the trial court, nor the Court of Appeals have identified any substantive reason why Defendants shouldn't have been allowed to cross-examine Mr. Baldwin with his discovery deposition testimony. And while the *de bene esse* transcript had been stricken as substantive evidence, it is

(as noted above) well established that evidence that would otherwise be inadmissible may still be used for impeachment. The ability of a party to cross examine a witness with a prior inconsistent statement is a fundamental trial tool, and any error in this regard could not have been harmless.

Regarding Defendants' Argument III, Plaintiffs moved for attorney fees as set forth in the Settlement Agreement. However, attorney fees awarded under contractual provisions are considered damages, not "costs." *Central Transp, Inc v Freuhauf Corp*, 139 Mich App 536, 548; 362 NW2d 823 (1984). As such, Plaintiffs were required to plead the attorney fees in the Complaint *and introduce evidence at trial* to support their contract claim. Stated differently, a party claiming a right to recover attorney fees under a contract must introduce evidence of the reasonableness of the attorney fees to establish a *prima facie* case and avoid a directed verdict. Plaintiffs' response to this argument rests on the notion that because they pled a claim for attorney fees, no trial proofs were required. Plaintiffs' position is not consistent with Michigan law. It is the equivalent of a tort claimant pleading the *prima facie* elements of a negligence case but failing to adduce any evidence of breach at trial.

Plaintiffs would (as the Court of Appeals did) disregard *T-Craft, Inc v Global HR*, unpublished opinion per curiam of the Court of Appeals, issued July 1, 2010 (Docket No. 285916), p 3 (Ex. 10 attached to Application). But in light of the factual and procedural similarities between *T-Craft* and this case, consideration of the *T-Craft* opinion is warranted under MCR 7.215(C)(1). In *T-Craft*, the panel noted that "[a]ttorney fees awarded under a contractual provision that entitles a prevailing party to recover its attorney fees are considered general damages rather than taxable costs." (Id. at 3.) For this reason, "a party claiming a right to recover attorney fees under a contract must introduce evidence of the reasonableness of the attorney fees to establish a prima facie case and avoid a directed verdict." (Id.) Because the *T-Craft* plaintiffs did not present "evidence at trial

to support their request for contractual attorney fees," the trial court properly denied their "post-judgment motion for attorney fees." (Id.) Similar to the plaintiffs in *T-Craft*, the Plaintiffs here neither asserted, nor presented any evidence at trial to support, their request for attorney fees based on the subject contract. Simply put, Plaintiffs never introduced any evidence at trial to support a *prima facie* case for attorney fees as an element of their claim for breach of contract.

Additionally, the Court of Appeals reached a result here that cannot be reconciled with *Pransky v Falcon Group, Inc*, 311 Mich App 164, 194-195; 874 NW2d 367 (2015). *Pransky* states that unlike "statutorily permitted or rules-based attorney's fees, contractually based attorney's fees form part of the damages claim. …. That is, the party seeking the award of attorney fees as provided under the terms of an agreement must do so as part of a claim against the opposing party." *Id.* *Pransky* held that "because the award of attorney fees was not authorized by statute or court rule, but was instead part of a contractual agreement, the trial court could only award the fees as damages on a claim brought under the contract. … A trial court may not enter judgment on a claim that was not brought in the original action in the guise of a postjudgment proceeding." *Id.* Here the trial court did precisely what *Pransky* says it could not.

RELIEF SOUGHT

For reasons set forth above, and in more detail in the Application, Defendants-Appellants Del Reddy, Aaron Howard, Michael Reddy and Immortal Investments, L.L.C. respectfully request that this Supreme Court grant leave to appeal or, on a peremptory basis, (1) remand for a new trial with instructions (relative to the issues regarding Mr. Baldwin) or in the alternative, (2) remand for entry of a new judgment to account for the erroneous award of post-judgment attorney fees.

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